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COLLECTIVE BARGAINING AND SOCIAL JUSTICE IN THE POST-COVID DIGITAL ERA

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ABSTRACT

This paper examines social justice and collective bargaining with a focus on higher education. Observations are offered around the following issues: a) a brief history of social justice as it has been conceptualized in labor management relations with a particular focus on unions in higher education; b) identification of collective bargaining scenarios when social justice platforms may have a more salient impact on negotiations; c) actions and strategies the parties might consider to accommodate social justice concerns in the bargaining process; and d) measuring and assessing collective bargaining outcomes. Collective bargaining in post-secondary institutions remains a complex phenomenon where political and legal guidelines are evolving particularly in a post-COVID environment. Accurate assessment of bargaining outcomes presents a variety of methodological challenges.

Keywords: collective bargaining, academic unions, social justice, higher education labor negotiations

A COMPLEX CONTEXT

The relationship between “social justice” and “collective bargaining,” is interwoven, complicated and long standing. Making sense out of what is transpiring on campuses today with respect to these two concepts requires an understanding of the definitions used to characterize these terms, the interpretation of “social justice” over time, the arc of social movements in the U.S., and the nuts and bolts of collective negotiations (which involve table dynamics and the legal and legislative parameters framing labor management interaction). To complicate matters, these relationships have undergone strain as the pandemic has exposed underlying weaknesses of current operational models and accelerated trends less visible prior to the pandemic.

One observation is increasingly clear: even with state and federal stimulus funds, coupled with an effective COVID vaccine, the post-secondary landscape (except for the largest and wealthiest schools) will probably not look as it did prior to the pandemic. The same may be said of labor management relations, which has seen changes in processes during the rise of the digital university. Many practitioners seem to think we will not see a return to what was euphemistically referred to as normal for years.

For example, a host of issues have arisen in negotiations because of the pandemic. These issues concern not only the negotiation process, much of which migrated to virtual formats, but also substantive matters such as mandatory vaccinations, whether faculty have the right to determine whether they will continue teaching online as opposed to being in class, whether a decline in resources, state, and federal funding will lead to further layoffs, the future of shared governance which some feel was neglected as a result of responding to the pandemic, and continued centralization of decision making given the need to respond to continued covid challenges. In “Red” states, for example, Alaska, Texas, Florida, universities located in blue enclaves, who may wish (with union support) stronger mask mandates are resisted by Boards and Governor’s Offices. Social justice issues are particularly prevalent in newer bargaining relationships, for example, graduate student unions, and these too are changing the labor relations landscape.

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The NLRB, not unaware of these dynamics, has recently issued guidelines for collective bargaining in the post covid environment (See NLRB General Counsel's Office Memorandum on Covid -19 Emergency Temporary Standard Bargaining Obligations, November 10, 2021.) Given the above observations, what might we say about the future of social justice and bargaining in higher education in the coming years?

DO WE SHARE COMMON ASSUMPTIONS?

Whether social justice issues inform collective bargaining processes at all reveals a cacophony of ideas, values, opinions, and views, some of which are connected to what actually occurs in collective bargaining negotiations, others not. To be sure, there are many facets of labor management relationships, less ideological in scope, which should not be framed under a social justice banner. These contract discussions, particularly with unions in place for years, may simply involve the give and take over contract reopeners, extensions, or traditional (and narrower) scope of bargaining matters; wages, hours and working conditions.

Social justice concerns invariably represent broader societal issues and revolve around the correction of perceived injustices to various social groups. More recently this has been referred to as Social Movement Unionism (SMU), or Social Unionism, a trend of theory and practice in contemporary trade unionism. SMU is distinct from many other models of trade unionism because it concerns itself with more than organizing workers around workplace issues, pay and terms and conditions. It engages in wider political struggles for human rights, social justice and democracy. SMU grew out of political struggles in developing countries and was theorized as a distinct industrial relations model in the late 1980s and early 1990s. In this model, trade unions are not distinct from social movements and form part of a wider ecosystem of political activism that includes faith groups, civic and residents' organizations and student groups, organized into democratic umbrella organizations and with a manifesto to which affiliates are committed. SMU attempts to integrate workers, trade unions and the labor movement into broader coalitions for social and economic justice. Thus, in theory, unions and other organizations support each other in what are seen as mutually beneficial goals.

When combined with labor management relations, which revolve around power and influence shaped by legal precedent, legislation, politics, and the "hammer and anvil" of the bargaining process, outcomes are varied and difficult to predict.

Contemporary points of view on the efficacy of social justice reflect differences in opinion over the meaning of social justice, how it impacts collective bargaining, the role of unions, universities and their obligations to society, the rights of those attempting to unionize, the ethics or lack of them inherent in capitalism, Catholic and Protestant social teachings, community organizing, institutionalized racism, diversity, inclusion, and salary equity. Many of these concepts are echoed in the current debate and sometimes find their way into negotiations involving particular employee groups. Moreover, as unionization drives are increasingly successful, particularly for adjuncts, part-time employees and graduate students, social justice concerns may eventually focus on the considerable inequities between working conditions and benefits for full-time faculty with tenure (compensation, teaching loads, etc.) and everyone else at the university save for a handful of senior administrators, many of whom had tenure and full professorships before becoming administrators.

The relationship between social justice matters being discussed in this essay vis a vis negotiations processes is further complicated because "social justice," as mentioned previously, is also raised on campus through student boycotts, legislative lobbying or other forms of advocacy simultaneously with or away from the bargaining process. "Social justice" has also been discussed in the context of other initiatives in higher education normally unrelated to collective bargaining, for example, student success, enhancing graduation and retention rates and the like. Here again, definitions and intent are important.

If for example by social justice we mean protecting employees from arbitrary decision making, unfair terminations, equal pay for equal work, or fair and equitable grievance and arbitration provisions, such matters are central to labor management relationships. If, however, by social justice we are referring to more expansive anti-discrimination protections, fair trade policies, anti-poverty initiatives, anti-globalization campaigns, race, gender and human rights issues, these concerns, however important, are not often well accommodated in bargaining.

Generally, the further away "social justice" is from the heart of labor management relationships, the more likely these union demands will be found not to be mandatorily negotiable and dropped at the bargaining table, particularly if compensation packages are improved or legal actions taken. The above notwithstanding, with the advent of the Biden administration, calls for reciprocity, fairness, equity and justice might be taken more seriously as constituencies who claim credit for the Biden-Harris ticket ask for what many would characterize as long overdue measures to address social justice concerns.

There is an old adage in labor relations among practitioners that suggests one's point of view is determined by what side of the table one sits. There is another quip about tables and universities applicable here which posits: if we were to construct a table with enough sides for all constituencies with a rightful claim to the university, it would need to be a round table. With these two "table"

caveats in mind, I endeavor to untangle issues followed by recommendations on how the parties could approach collective bargaining from a social justice perspective in the post-COVID digital era.

LABOR HISTORY AND SOCIAL JUSTICE CONCERNS

Many would agree labor unions have historically advanced social justice. From the earliest labor unions, the earliest attempts in the U.S. to merge social justice and assertion of worker rights date back to 18th-century New England and the mid-Atlantic region. Industries devoted to rope and barrel making, the construction of canvass sales for ocean-going sailing vessels, and a new textile industry, provide early examples of how these concepts and ideas shaped conflicts over the rights of respective parties: the jurisdictional territories between communities, laborers and owners. Such conflicts included the call for worker safety, more sanitary conditions, freedom from harassment, and an end to indentured labor, among others. Well into the 20th century, powerful elites, the courts and federal legislation defended owners in these conflicts, not workers.¹

Early in the American labor movement we find a growing divide between those who advocated social reform and workplace democracy versus “business unionism,” or what many 19th and 20th century labor leaders referred to as “bread and butter” unionism.² These differences in orientations and approaches are evident today as we shall see.

A practical form of collective bargaining has transcended (with a few exceptions) more ideological approaches. This has not been the case in Europe, Latin America or South Africa. In the U.S., “ideology” has been less a factor and, in most jurisdictions, securing higher wages and better working conditions continues to drive bargaining. The old saying, “let’s rise above principle and settle this contract” infuses labor management dynamics to this day. However, through the years labor unions have successfully addressed important societal issues such as child labor, the length of a working day, living wages, health and welfare, the environmental safety of workers, parental leave, medical and related benefits, and other concerns (economic prosperity, upward mobility of workers, workplace democracy) that many Americans take for granted. Such gains often came at great personal costs and sacrifices to individuals and communities.

While gains made at the bargaining table have ebbed and flowed over time, depending on those who occupy state and federal offices, (did anyone ever expect to witness Michigan or Wisconsin as right-to-work states?) and some argue (with evidence) that the union movement in the private sector has been gutted since the heydays of the 1950s. In the public sector, where the major growth in unions has occurred since the 1960s, the trajectory has been toward what many would characterize as more progressive and equitable policies.

Of course, labor history is never neat and tidy. Organized crime infiltrated some unions. Nor is the record clear whether unions in general have advanced the rights of marginalized populations or women. Well into the 1950s and 1960s, many industrial and craft locals were forced to desegregate; they did not do so willingly. Police and firefighter unions in numerous cities are presently under consent decrees to hire and promote minority candidates. Add to this the perception that some union leaders are thought to exhibit lifestyles more in common with the company CEOs than with rank and file men and women. Even in constituencies where there should be support for unions, they are thought by some, across the political spectrum, to be complicit in the “structural apparatus” working to the disadvantage of marginalized populations and, over time, the entrenched power of union bureaucracies serves to protect the status quo.³ Of course, the situation is complex, and the dynamics, realities, outcomes and points of view around unions in education as opposed to those in manufacturing or shipping, are different.

An argument can also be made when it came to broader political support (perhaps not locally), engagement in the civil rights movement among organized labor, the UAW a good example, has been consistent over many years. There are close ties between civil rights and some unions especially in the public sector (AFSCME in many places) and 1199 in New York City. What we also witnessed in 2020 election is that many white and less educated workers, the traditional base for unionism in midwestern states for example, voted for candidates hostile to collective bargaining. The tectonic plates that underlie support for unions and collective bargaining are changing in ways not entirely clear at this time and attitudes remain polarized: a legacy of the Trump era.

Social justice proponents, often using the term “Bargaining for the Common Good,” a newer label for social unionism, represent a vigorous faction within the labor movement. They are focused on how to win organizing campaigns, transform union campaigns into broader human rights and community action, help dues-paying members connect to their union, and advance union membership for societal gains. These groups are also part of the broader movement for social justice in society which transcend narrower union issues. These goals can, and do, conflict with the practical business unionism approach of the established union leadership. Here tensions reflected in the labor movement are not unlike those in the Democratic party between those who may identify as more established centrists versus progressive left-leaning advocates. Coalitions unite to oppose a common adversary and fall apart, arguing among themselves, soon after an election.

Academe is not immune from these attitudinal and political crosscurrents and the push for “social justice” in higher education is more readily seen in negotiations involving employees (often newer unions, with less power); graduate assistants; part-time employees, adjuncts, and clerical employees.⁴ The impact of social justice concerns is more difficult to discern in negotiations involving full-time faculty, laborers, or craft locals, and the like, where contracts have been in existence 40 or 50 years or longer. Social justice concerns may be on the minds of represented faculty or craft employees, but such concerns are not often realized during negotiations. Contract clauses covering, for example, discrimination, salary distribution or “recognition” are immeasurably harder to amend once in existence for many contractual years. Particularly in the give and take of “trade-offs” involved in negotiations, the notion of “if it ain’t broke don’t fix it,” (which, in negotiations, refers to contract clauses which have not been the subject of grievances, legal challenges or arbitrations), serves as a powerful protector of the contractual status quo.

COLLECTIVE BARGAINING IN HIGHER EDUCATION

The union movement in higher education stretches back over 100 years although, in general, negotiations with legally “recognized” faculty unions did not occur until the judicial, legislative and political environments in several regions became more supportive of organizing activities in the 1960s. Unions in academe, however, predate the 1960s. The “Daily Illini” contains news of a union action by Custodians at the University of Illinois in 1917 (asking for an increase of six cents an hour in wages) and faculty locals existed in Montana and South Dakota nearly 100 years ago. No doubt there were many other attempts at organized activities. Following more favorable federal legislative and judicial treatment in the 1930s and 1940s, early craft unions appeared in the Ivy League (for example, painters at Columbia in 1938) and faculty at Howard University, Hampton Institute and the New School for Social Research, organized and were recognized in the latter 1940s.⁵

However, it was not until the mid to late 1960s, following the passage of public sector labor legislation (and significant social upheaval on campus with many echoes of social justice we hear today), that unions gained a real foothold in academia commencing in New York, Michigan and Wisconsin.⁶ Bargaining for full-time faculty in the private sector also began in this era, particularly in the same states where public employees unionized.

Following a ruling by the Supreme Court in *NLRB v. Yeshiva Univ* (1980) that full-time faculty members were considered ‘managerial employees,’ bargaining in the private sector was curtailed particularly for units trying to gain recognition or negotiate a first-time contract. The decision had a negligible impact on established units in the private sector, for many reasons, and a majority continue to exist. The court found that such employees (but not graduate assistants/students, adjuncts or clerical groups) were generally excluded (because they exercised discretion over so many work-related matters) from coverage of the National Labor Relations Act and hence unable to claim employee status required by law to bargain collectively.

Although unionization of part-time, adjunct and graduate student employees has grown considerably in the private sector since the Yeshiva decision, it is the public sector that remains the most robust for faculty where it is estimated over a third are represented, primarily in states (approximately 15) that are, or were, favorably disposed to public sector labor unions.⁷

In these locales, unions representing public employees have access to state legislators who not infrequently succumb to union demands.⁸ There has been a great deal written about unions in academe, the reasons for their existence, the causes and consequences. For purposes of this essay, the following information about collective bargaining in higher education is pertinent:

- Institutional and demographic factors shape the process. For example, bargaining with academic-related personnel and faculty is associated with larger institutions and public two-year and four-year systems in the east and mid-west and several (what are considered to be) union-friendly states (with enabling labor legislation) in the far west and Florida. Institutional prestige tends to be inversely related to the presence of unions with respect to four-year faculty (this is not the case for graduate students or assistants or adjunct/part-time faculty, where the elite private sector has become fertile ground for organizing campaigns).

Parenthetically, it may not be prestige per se, but the individual and departmental autonomy, lighter workloads, and greater voice in institutional affairs full-time faculty in higher prestige institutions possess, all of which mitigate against needing a union. Such is not the same for faculty in many comprehensive state systems or two-year schools. For example, full-time faculty bargaining units exist in only five member institutions of the Association of American Universities (AAU), an association considered the most exclusive.

Even here the demographics are interesting. Of the five, two (SUNY Buffalo and Stony Brook) are part of the huge New York (SUNY) public university system. The University of Oregon and University of Florida, also organized, were, but are no longer, in large state systems. Rutgers University, the other AAU member, is situated in a state with accommodating labor legislation and where all public sector colleges and universities (and most public sector employees) are unionized. The overwhelming

majority of organized public sector faculty can be found in comprehensive state college systems in locales where favorable legislation supporting unionization exists or existed, and where the majority of faculty have few opportunities for mobility to other institutional sectors.

- Faculty unionization reflected, from its earliest inception, the desire to gain more control, or safeguard jurisdiction over, decision making in academic matters: the curriculum, and particularly reappointment, promotion, and tenure. Later in the 1960s and 1970s the union movement in academe may have been energized by opposition to the war in Southeast Asia, changing mores in society, permissive attitudes and the like, but I would suggest preserving hard won gains in shared governance and professional autonomy which included promotion and tenure processes were the primary factors. During this era, a rise in student power and student rights sometimes intersected with the rise of faculty unions and at other times did not.

Whether or not these two movements reinforced or negated each other is at best speculative. No doubt the reaction to what was perceived as arbitrary decision making and heavy-handed management of university leaders, over teaching schedules and workload, research and other funding priorities spurred organizing activities. These trends emanated, in the eyes of organized labor and many faculty, from the corporatization of academe, the nexus of academic and the military industrial complex, and later, a decline in state and federal support leading to the need for alternative revenue sources, downsizing and the like, in response to fiscal and enrollment-related factors. This was definitely not the view from those leading institutions; their reality was and remains very different; shaped by enrollment, student demand, funding and political factors. The rise of unions in the public sector correlates with favorable legislation incorporating public sector labor boards to oversee unionization.

Many unions may have also reached out to new clienteles for dues in the wake of declining traditional employee bases. Faculty in public institutions soon found they were the only groups at state capitals lacking union representation, and because of this, were without concomitant leverage needed to pressure state legislators and other elected officials to assign greater resources to post-secondary education. Deliberative processes associated with senates and shared governance in general (some of which did not even operate in the summer) were not initially able to accommodate themselves to the realities of decision-making environments, as internal and external forces buffeted the academy in the 1960s and 1970s.

Unions represented a more effective way to assert voice. The desire to preserve professional autonomy, shared decision making and safeguard the status quo were more salient than economic concerns for faculty who sought to unionize in these years. After all, in comparison to many in the labor movement, the vast number of full-time faculty have exceptional working conditions, salaries and benefit packages compared to (with a few notable exceptions in arts, entertainment and professional sports) other unionized workers.

The union movement commencing in the 1960s was largely non-ideological and focused on “boiler plate” contract matters. These included; recognition of bargaining agents, preservation of craft-like or professional authority over entrance into and promotion through academic ranks as well as academic freedom, workload, grievance and arbitration provisions, and equitable layoff clauses. What occurred in academe from a labor relations perspective did not mirror collective bargaining in numerous industries. There remain unique aspects of labor agreements, for example, the preservation of academic freedom and “academic judgement” which is normally withheld from arbitral review.⁹

- Non-ideological approaches prevail in more established relationships and unions representing faculty have partnered, and in some cases merged, with other unions regardless of organizational differences or ideology. For example, more full-time faculty are represented by joint affiliations of the AFT, NEA or AAUP then are represented by a single bargaining agent. This has not been the case with graduate students, clerical or adjunct/part-time employees. Here, many of the more established academic unions appeared to be reluctant, for a variety of reasons, to represent units comprised solely of graduate students or assistants, particularly at elite private schools (where faculty were not represented) or in larger state systems.¹⁰

More often than not, bargaining representative for these groups, where their status as employees is often contested, tend to be unions characterized as “industrial unions” (UAW, CWA, UE, SEIU) many in search of new dues paying members. Perhaps, in the case of SEIU, the union may have been approached by employees in need of representation after more traditional education unions failed to accommodate certain groups. In these locales SEIU may have been well organized at the ground level and used a city-based strategy not unlike their geographic labor market strategy used for janitors in the west. Interesting however, that despite a great deal of rhetoric to the contrary, claims by one bargaining agent to be more effective than another agent in advancing the rights and benefits of one or another employee groups are suspect and few, if any, scholarly or objective studies, demonstrate this to be the case.

- It is in the organizing and negotiations of “first-time” contracts covering graduate students, part-time, adjunct faculty, clerical employees where the emergence of social justice concerns are most salient. Why is this the case? To begin with, collective bargaining relationships are newer or emerging. Once contracts have been ratified and the parties are living with them, it is much harder to change existing language and, in bargaining “trade-offs,” more established unions have dropped “common good” proposals in favor of economic gains. Secondly, social justice has been a potent force for organizing those who may believe themselves to be more marginalized, have fewer, if any, opportunities to exercise influence, and are non-represented. It is not surprising that contract proposals from newly organized groups reflect social justice issues.

WHEN SOCIAL JUSTICE FACTORS INFLUENCE NEGOTIATIONS

In my experience, the following variables determine whether social justice precepts are introduced during negotiations, possibly shape negotiation discussions, and result in contract clauses which reflect social justice concerns:

- The age of the bargaining relationship and whether the contract represents a successor agreement or first-time contract;
- The definition of the scope of bargaining in federal, state labor statutes, or scope as determined through past practice;
- The type of employee group represented and the extent to which social justice issues were utilized to initially organize them;
- The extent to which a particular faction of employees in a bargaining unit have embraced social justice and have the organizational power to ensure such concerns are acted upon;
- The views, skills, sympathies, and levels of trust between the chief negotiators. Experienced negotiators on both sides of the table find ways to introduce such precepts or, conversely, ensure they will not be advanced during negotiations;
- The primary issues framing bargaining and the extent to which leaders at (or away) from the table, agree with the broader aims of social justice and are in a position to exercise power, or absorb organizational conflict, both of which are invariably required to obtain bargaining objectives;
- The extent to which important constituencies who impact negotiations support social justice concerns/issues during negotiations;
- The agenda of bargaining agents representing employees and whether that agent also represents (and has negotiated contracts with) other employees in the same institution or system that reflect social justice precepts.

NEGOTIATING FROM A SOCIAL JUSTICE PERSPECTIVE

What follows are observations on how the parties may more effectively accommodate social justice precepts during negotiations. At the outset what is being recommended works well in traditional negotiations, in fact some recommendations have been a feature of labor management relationships for the past 75 years. It may be worth noting as well that negotiating from a social justice perspective may appear superfluous to many union advocates with social justice agendas.

However, the points raised here are germane to employer representatives who, in my experience, often interpret “social justice type” proposals in one of four ways: a) as needless and perhaps harmful expansion into the scope of bargaining or arbitral review; b) demands the university (or state) has little, if any, power to effectuate; c) as arguments for higher compensation based meaningful but perhaps somewhat abstract and naive funding principles; or, d) as continuation of political organizing activities by groups who may not be able to arrive at compromises needed for settlement.

Ironically, even if employer advocates sympathize with a number of social justice type proposals (and many do) the folks they report to may not, or economic realities at the present time do not, permit entertainment of demands. Beyond the narrower internal issues, however, in some locales, social justice objectives intersect with roles and responsibilities of colleges and universities in communities where they are located. Resisting proposals can be damaging politically or reputationally. Consequently, the parties may be well served to consider the following recommendations particularly as impact bargaining occurs over loss of revenues in the wake of the pandemic.

Agree Upon Shared Definitions of Social Justice and How These Definitions Apply in the Collective Bargaining Setting

Proposals that seem straightforward to union negotiators may be interpreted as so far out of scope to employers they may be reluctant, for a variety of legal and political reasons, to discuss them. For example, demands to demilitarize or defund campus police departments may be put on the table and no doubt reflect broader societal concerns with police and the rights of marginalized populations.¹¹ In such cases proposals which may seem morally or ethically sound to one party may be viewed with extreme skepticism by the other, thought to be beyond the scope of bargaining, even the control of one party to address, regardless of what is negotiated.

Expansion of the scope of arbitral review for non-mandatory subjects of bargaining may dissuade conversation on matters that appear basic and directly relevant to those with a social justice perspective. Shared definitions and criteria around the scope of

bargaining and the costs of proposals may enable the parties to identify other kinds of approaches that will satisfy constituencies who shape bargaining from afar and, more importantly, whose support is necessary to ratify agreements.

Agree Ahead of Time on Shared Methodologies to “Cost-Out” Proposals

This is always an important feature of labor relations but particularly so in this case for several reasons. First, what might seem like a negligible cost to a bargaining agent may in fact appear overwhelmingly costly to the institution.¹²

As one example, consider the matter of benefit coverage for transgender operations, which may by some be considered a human right and should be included more broadly in all benefit packages. While such procedures may be a negligible expense for employees in one bargaining unit, institutions, should they agree to provide coverage, may be legally obligated to provide such benefits to all employee groups. In such cases costs assume a different proportion, and what may appear to be “fair and equitable” to one party may be unaffordable to the other.

Changing institutional budget and resource priorities in a post-COVID era, when unionized institutions will become more, not less, dependent on state and federal support (and when elected officials will be more concerned with the economy in general) is fraught with pitfalls and may require agreement of important external constituencies and reconsideration of tuition (not always under the control of university officials), revenue streams, deferred maintenance, operating expenditures, and the like. If agreement can be reached beforehand on meaningful institutional “comparators” and costing methodologies, (always important in all negotiations) arguments can be ameliorated to the benefit of the parties. Take the seemingly straightforward issue of a “living wage” which is often predicated on factors associated with the cost of living (COL) in a particular locale. Agreement on a COL cost methodology could advance negotiations and arguments on whether the COL is similar or different in Berkeley, New Haven, Cambridge or Ann Arbor. In fact, such arguments can delay negotiations for months, perhaps to the detriment of all concerned.

Educate All Parties About the Fundamentals of Collective Bargaining and Possibilities Inherent in Established Processes to Address Challenging Social Justice Issues

Unions representing graduate students in particular often appear not to have a firm grasp on or choose to ignore for whatever reasons, many of the essential basics of negotiations in place for nearly a century. For example, appointing “team coordinators” or “revolving negotiators” as chief spokespersons may seem reasonable to some union advocates and ridiculous and non-productive to experienced employer representatives. Better understanding of what constitutes an “unfair labor practice” or an “end run,” and how such tactics derail negotiations and destroy trust between the parties (the latter almost always essential for final settlement) will advance discussions.

The value of arriving at a “tentative agreement” (and knowing what that means in the bargaining context) is important if bargaining is to be productive. The importance of establishing and adhering to “ground rules,” why tweeting or taping bargaining sessions, or viewing compromise as capitulation (the above lead to non-productive outcomes), should be understood. Negotiations will not conclude effectively if viewed as political theater, but operate well when long-standing best practices, procedures and guidelines are employed. For example, employing “side bar” discussions or union-management committees (which are given a defined scope, timelines, and meet away from the table, making recommendations to the parties) constitute an effective approach; one used successfully for the last 75 years to resolve contract disputes. This strategy, recently used by the University of California in negotiations with the UAW proved effective in addressing social justice issues.¹³ To complicate matters, the legal environment for labor management relations for some groups (graduate students in the private sector) is still evolving; additional reasons to ensure the parties are cognizant of time-tested methods to resolve disputes.

SOCIAL MEDIA AND ITS IMPACT ON NEGOTIATIONS

Bargaining with a group more adroit in the use of social media can confound those who may not be as conversant with these communications and organizing strategies. Graduate students or teaching assistants for example, may be less sophisticated (or influential) around reaching settlement at the bargaining table but more effective using social media for leverage, political disruption or continuation of the organizing process. Bargaining reflects the exercise of power and influence. In this respect pitfalls exist for professionals at the bargaining table. For example, a skilled negotiator may not take seriously the political theater unfolding at the table or on campus.

However, Presidents and Provosts may be sensitive to legislators and board members who want to know why disruption on campus is occurring. Those in power have adversaries and competitors who skillfully use such scenarios to demonstrate why a particular leader in charge cannot manage the situation (and therefore should not be in charge). Presidents and Provosts may not be familiar with (or may not have time to study) the give and take at the table, the details of proposals and counterproposals, or legal challenges winding their way through labor boards or courts.

Often these individuals have been told by well-meaning experts that there are “ground rules” to prevent social media campaigns, and that theatrics at the table, or “legal challenges” have no merit. While the above may be true, people in charge get concerned when students, alumni, legislators or full-time faculty, may be influenced by social media, and start calling about ongoing conflict involving other groups beyond the union trying to reach agreement. Presidents may be vulnerable if they appear unable to resolve conflict without communicating why. University representatives would do well to prepare for wider social media campaigns that inevitably accompany negotiations. Employer side bargainers, particularly in larger institutions, may be challenged on how to keep senior leaders (often many administrative levels above them) informed. In addition, a number of the union leaders involved are often unfamiliar with post-secondary education cultures and therefore reluctant or unable to exercise authority at the table.

Add to this mix, and in my experience, that departmental faculty will be inclined to side with graduate students or research assistants and will exercise real pressure on Deans and others to admit them back into the classroom regardless of the tactics, legal maneuvers, or demands made during negotiations. What may seem like nonsensical or ineffective bargaining to professionals at the table may be taken in a very different light by senior academic leadership or others away from the table. The result will be far less leverage in bargaining than might be suspected by those representing the university (or in some cases the union) unless issues discussed here are planned for in advance.

MEASURING AND ASSESSING COLLECTIVE BARGAINING

Attempts to measure and assess collective bargaining in higher education, especially in the areas of social justice, fall into two general categories. The first has to do with research on the impact of bargaining on human resources, institutional autonomy, or decision-making processes in the organized college or university. The second has to do with measuring or assessing the impact of collective bargaining on progress the parties may make toward realizing particular institutional or organizational goals and objectives. With respect to the first area, a considerable degree of research on these matters exists and much of the evidence is inconclusive, which is not surprising considering that bargaining processes and outcomes are very difficult to untangle and separate from other forces buffeting the academy.

This is certainly the case with more expansive social justice issues. Moreover, upon closer scrutiny, generalizations are difficult because of the substantive differences in mission, funding formulas, other institutional and demographic variables, between the types of colleges and universities where collective bargaining is found. For example, on the general questions of whether unions are associated with higher salaries for college and university employees, or have benefitted employees from marginalized or underrepresented groups, there is evidence going back 40 years which supports these assertions and evidence that negates them. In my experience, collective bargaining itself has not, for example, had a deleterious impact on institutional quality, the manner in which curriculum is developed, the student mentor relationship, professionalism of faculty, affirmative action, scholarly productivity, student success or graduation rates.

Shared governance, as well, has by and large coexisted with unions. Whether unions per se protect the jobs of the less competent, those on part-time contracts, curtail academic freedom, or alter existing promotion and tenure processes or standards, has also not been the case across the board in my experience, although no doubt this has happened on some campuses.

The extent to which social justice concerns are accommodated as a result of bargaining will depend on how focused the parties were on such matters (and how close they were to the scope of bargaining) at the time negotiations commenced. The above also depends on the union or university leadership and how their experiences and perceptions of “history” shape bargaining dynamics. A number of the earliest predictions made about unions in academe have been difficult to assess because many predictions were based on attitudinal surveys which proved incorrect when it came to predict actual labor management outcomes.¹⁴

This is not to suggest that bargaining has been without any impact whatsoever. It has, but not in ways envisioned by those studying these processes initially. Bargaining has changed decision making by moving authority upward to legal, labor relations and state offices, codified handbook policies and made them more consistent and subject to grievance procedures ending in arbitral review. The latter giving a final decision-making authority on contractual matters (grieved to arbitrators, not university administrators) and thus representing a real change in control over contractual policies and procedures.

Certainly, the type of “old time” administrator who made individual arrangements with faculty (on workload for example) does not often survive in an organized environment. Bargaining imposes new kinds of deadlines and accountability for decision making, provides forums that offer “newer” employee groups formal and consistent input into decision making; those not traditionally included in shared governance forums.

In my experience organized faculty may have greater protection and autonomy from decisions they consider unfair or arbitrary. The manner in which conflict is managed and decisions are effectuated in unionized organizations is different than in the non-

unionized. It may also be the case that more sophisticated longitudinal approaches are needed to properly discern the full impact of unionization. Non-advocacy research which purports to compare rights, privileges, working conditions, faculty voice and the like, of those in unionized institutions with those in non-unionized locales, is less common, and conducting objective studies are fraught with methodological challenges.

The second area, as stated above, concerns measuring progress the parties make toward realizing organizational objectives through collective bargaining. In essence utilizing the bargaining process to advance goals rather than, for example, preserving the status quo (which can, in and of itself, be a laudable objective particularly at this time. Depending on which side of the table one is sitting, simply extending the current contract may be a desirable outcome). In conducting negotiations and administering contracts, research exists on best practices. Of course, it is also the case that if either party achieves what it sets out to do initially goals are accomplished (for example, gain recognition or a multi-year settlement, the latter may work to bar union competitors from trying to organize the same unit; often a union goal during the first rounds of bargaining in newer relationships).

In these kinds of cases an employer or union can point to, at least for the short term, identifiable measures of success. In my own experience the bargaining process can be used to advance long-term institutional or justice type objectives under the following circumstances; where institutional leaders are supportive and willing to withstand conflict that inevitably accompanies labor management relationships where substantive changes in processes and outcomes is desired, when negotiation parameters are developed inclusively, where the legal environment presents autonomy to the parties, where a significant number of people in the respective bargaining unit may be dissatisfied with the status quo, and where requisite authority is given to and used effectively by the chief negotiators.

Advancing long-term social justice type objectives is far more difficult in politicized larger public institutions/systems where those responsible for major decisions often work in state capitols, negotiators may not be system employees, or in multi-campus systems where university leaders may compete with or distrust each other. Sometimes, the procedures and processes inherent in enabling state labor legislation governing bargaining are less accommodating to those desiring substantive changes through negotiations processes. In these contexts, there are multiple players and constituencies, many with competing agendas, and bargaining more often results in preservation of the status quo. Whether the pandemic will change these observations remains to be seen.

A FINAL THOUGHT

Bargaining processes are cyclical. They reflect the needs, interests and influence of various employee groups and employers at particular historical times. Newer bargaining relationships are often focused on concerns, many of which were settled long ago in contracts for other employee groups. Once matters are negotiated and codified into collective bargaining agreements, they become, over time, the “status quo,” and, as such, are more challenging to change. Tom Mannix, now long retired and one of the early pioneers of labor relations in higher education in New York, Michigan and California, once observed in regard to this matter that codification or maintenance of the status quo represents real advances to some, or a detriment to others, depending on the rights and privileges, or lack of them, the respective parties had prior to bargaining.

Over time, if social justice proposals are embraced by the individuals and constituencies (labor or management) who determine bargaining outcomes, such concepts will inevitably be codified into labor agreements and become the “status quo” which will be, as they are now, the subject of debate for a future generation.

ENDNOTES

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- ¹ The influence of the Catholic and Protestant church can be found on both sides of conflicts involving workers and owners. See, David Brody, Ed., *The American Labor Movement*. New York: Harper and Row Publishers, 1971; Lens, Sidney, *Radicalism in America*. New York: Thomas Y. Crowell Company, 1966; Daniel J. Leab, Ed., *The Labor History Reader*. Champaign Urbana: University of Illinois Press, 1985; Foner, Philip S., *History of the Labor Movement in the U.S. Volume 1*. New York: International Publishers, 1982.
 - ² Michael R. Carrell and Christina Heavrin, *Labor Relations and Collective Bargaining*. 10th Edition. Chapters 2 and 3. New Jersey: Pearson Education, 2013.
 - ³ James N. Baron and David M Kreps. *Strategic Human Resources*. New York: John Wiley and Sons, Inc Chapters 5 and 6.
 - ⁴ See chapters by Tim Cain and Nick DiGiovanni in D.J. Julius *Collective Bargaining in Higher Education*, Routledge 2021.
 - ⁵ Timothy R. Cain, “The First Attempts to Unionize the Faculty,” *Teachers College Record*, Vol. 112, No. 3, March 2010; “Janitors Union Asks for a Raise” *The Daily Illini*, Vol. 46, No. 91, January 16, 1917, page 1; Julius, D. J. “The Status of Faculty and Staff Unions in Colleges and Universities: 1930s–1990s.” In D.J. Julius (Ed.), *Managing the Industrial Labor Relations Process in Higher Education*. Washington, D.C.: College and University Personnel Association, 1993.; Herbert, William A. (2017). “The History Books Tell It? Collective Bargaining in the 1940s,” *Journal of Collective Bargaining in the Academy*, Vol 9.

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- ⁶ Ladd, E. C. & Lipset, S. M. (1973). *Professors, unions and American higher education*. Berkeley, CA: The Carnegie Commission on Higher Education.
- ⁷ Herbert, William, Apkarian, Jake and Joseph van der Naald. 2020. *Supplementary Directory of New Bargaining Agents and Contracts in Institutions of Higher Education*. New York: National Center for the Study of Collective Bargaining in Higher Education and the Professions, Hunter College, CUNY, 2020.
- ⁸ See endnote 5, above, and 14, below.
- ⁹ It might be of interest to note that arbitrators who work in industry, those who adjudicate disputes in the NFL or NBA, or for unions representing city or state workers, teachers, firefighters, police, ballet dancers, journalists or airline pilots, serve as arbitrators for colleges and universities. Collective bargaining has proved itself to be very elastic and flexible. The industrial labor relations environment has accommodated unionized colleges and universities regardless of how unique faculty or administrators believe their working arrangements and institutional cultures are. Arguments around “professionalism versus unionism” were brought forward by those scholars who wrote in the 1970s about the emergence of collective bargaining for faculty. These concerns were eventually muted due to a lack of evidence to substantiate such claims and as industrial labor relations processes, precedents and procedures from industry and other public sector jurisdictions, were adopted and adapted in academic organizations. By the early 1990’s, none other than Clark Kerr, former President of the University of California, and an industrial labor relations scholar, identified faculty unionization as an extension of shared governance and a formalized assertion of professional rights. A very cogent argument can be made which suggests collective bargaining has preserved professional or craft-like prerogatives and rights. Information on the numbers of faculty unionized, their bargaining agents and the like, can be found at the National Center for the Study of Collective Bargaining in Higher Education and the Professions, <http://www.hunter.cuny.edu/ncscbhep>.
- ¹⁰ In recent years the AFT has been active organizing graduate students at elite institutions (Cornell, Brown, University of Chicago, Georgetown and Pennsylvania among others). It would also appear that social unionism is stronger in graduate student union campaigns.
- ¹¹ Nadine Fishel, *Collective Bargaining in the University of California*, in D.J. Julius, *Collective Bargaining in Higher Education*, Routledge 2021.
- ¹² The lack of tax revenue stemming from pandemic-related challenges to the economy will make economic factors far more salient in the future. While the parties may initially delay tough decisions in the hope stimulus funds address shortfalls in state and federal support, it is probably the case that more furloughs and layoffs are on the horizon. Unfortunately, this may occur in more tuition-dependent schools with declining enrolment and at state schools (less in flagship institutions) in larger systems; schools with less political clout, and where identities, missions and outcomes may be less evident to funding authorities.
- ¹³ At the University of California the UAW (a union with a social justice agenda) clearly articulated concerns for human rights and discrimination issues and proposed the following; divestment of retirement funds in fossil fuels; demilitarization of the campus police; all-gender restrooms including signage and conversion of single stalls; and sanctuary campus; no cooperation with DHS on immigration issues. The parties recently settled a four-year contract and agreed to a one-time committee to discuss campus policing, an immigration side letter outlining procedures, and language for all-gender restrooms. The above notwithstanding, which social justice precepts are introduced, or the proclivity to drop social justice language in favor of more acceptable “boiler plate” clauses, is not always clear cut. During negotiations between Tufts University and graduate students represented by SEIU, the union argued to expand the definition of discrimination based on “socio-economic status”. However, the final clause agreed upon by the parties is a standard anti-discrimination clause. Social justice concerns were introduced but for whatever reasons were dropped. Other issues, on many campuses, where social justice issues are raised, include gender equity in pay, Title IX, with respect to sexual assault on campus, and paid family leave. At the University of Vermont, Plymouth State University, Wayne State University, Michigan State University and the University of Florida, unions representing graduate assistants or students proposed lesser overall salary increases in favor of larger increases for lower paid members. Examples of a complex relationship between social justice and business union interests can also be discerned in negotiations over concepts such as “seniority” and “across-the-board” salary increases. Using seniority, for layoffs, economic benefits or other actions (seniority being a very hard won concept for unions), often favors those who have been in the organization the longest and if used to determine benefits or layoff status, employees newly hired (who may be women or those from marginalized groups) can be disadvantaged. Across the board salary percent increases, very common in many negotiations, provide for higher raises to longer serving employees; those who have reached top step salaries (after all, 3% of \$70,000 represents a higher amount than 3% of \$35,000). Here too, union proposals may conflict with the values of individuals who are more concerned with pay equity or the rights of recently hired employees. The situation becomes more complex when lower paid part-timers and tenured faculty are in the same bargaining unit. Tension also arises when, for example, unions have the right not to represent those who refuse (or cannot afford to pay) union dues. To be sure, chief negotiators on both sides of the table interested in advancing social justice concerns can have an impact. In my own work, during the 1970s and 1980s at the Vermont State Colleges and University of San Francisco, as chief negotiator I proposed, for adjunct faculty and clerical employees, articles on pay equity, job security and family related leaves (considered very progressive at the time although not called social justice). There are always alternative approaches to addressing recognition, compensation, discrimination, seniority, work-life balance and other contractual matters. In certain jurisdictions and particularly where labor management relationships have remained stable and professionalized, social justice type clauses have been proposed by the administration or union and eventually ratified.
- ¹⁴ Daniel J. Julius and Nicholas DiGiovanni, Jr., “Academic Collective Bargaining: Status, Process, and Prospect.” *Academic Labor: Research and Artistry* 3, article 11 (2019): 127-183. <https://digitalcommons.humboldt.edu/alra/vol3/iss1/11>; Ladd, E. C. & Lipset, S. M. (1973). *Professors, unions and American higher education*. Berkeley, CA: The Carnegie Commission on Higher Education. In this study the authors found that faculty from the highest prestige public institutions, particularly junior faculty, were by and large, the most supportive of collective bargaining. In fact, this is not where unions have gained a foothold and few of these organizations are unionized. On attitudinal studies and collective bargaining see; Rosenfeld, Jake, *What Unions No Longer Do*. Harvard University Press, 2014; Freeman, Richard B., and James L. Medoff, *What Do Unions Do?* Basic Books, Inc., Publishers, 1983.